United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ernest C. Reed,

Appellant,

vs.

United States of America, Charles E. Sebastian, Chief of Police of the City of Los Angeles, and Patrick J. Phelan Agent of the State of Iowa,

Appellees.

IN THE MATTER OF THE APPLICATION OF ERNEST C. REED FOR A WRIT OF HABEAS CORPUS.

REPLY BRIEF OF APPELLEES.

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REPLY BRIEF OF APPELLEES.

This is an appeal from an order of the United States District Court for the Southern District of California, discharging a writ of habeas corpus sued out in behalf of the appellant and remanding him to custody. The application for the writ was based upon the assertion that the indictment found by the county in which the crime is alleged to have been committed and under which petitioner as appellant here is restrained, and which was presented to the governor of the state of

California for the purpose of extraditing the petitioner to the state where the crime is alleged to have been committed, did not charge him with the commission of a crime against the laws of the demanding state, and upon the further ground that the said District Court erred in refusing to permit petitioner to prove that he was not a fugitive from justice from the laws of the demanding state. In order that a writ might be obtained from the federal court, the application was based upon the assertion that petitioner was not a fugitive under the provisions of section 5278, U. S. Revised Statutes. Presumably, his application was based upon the theory that he was restrained of his liberty without due process of law, and was not a fugitive within the provisions of article IV, section 2, clause 2, of the Constitution of the United States. This appeal is prosecuted to this court as a writ of error and a motion to dismiss the appeal has been regularly served and filed, as required by the rules of this court, noticed for hearing upon the day fixed by this Honorable Court for the hearing of this appeal, said motion to dismiss being based upon the claim that this appeal, because it involves the construction and application of certain provisions of the Constitution of the United States, as well as the constitutionality of a law of the United States, should have been taken directly to the Supreme Court of the United States and that, therefore, this Honorable Court is without jurisdiction to entertain or hear the said appeal.

Without waiving the motion to dismiss the appeal or the right to be heard thereon, and without abating

in the least our contentions that the appeal has been improperly taken, we offer the following suggestions and authorities in answer to the opening brief filed by appellant.

Two errors are assigned by appellant.

1. That the lower court erred in declining to hold that the indictment found by the grand jury of the county where the offense is claimed to have been committed did not properly and legally charge the prisoner with a crime.

2. That the lower court erred in excluding testimony for the purpose of showing that a prosecution for the crime was barred by the provisions of the statute of the state where it was committed for the reason that petitioner was publicly a resident of the state for more than three years after the alleged commission of the crime and, therefore, is not a fugitive from justice.

In answer to the first assignment of error, it must be remembered that upon the hearing under a writ of habeas corpus, this court will not consider whether the evidence was sufficient upon which to found an indictment, but the inquiry is limited to the question whether the indictment upon its face states a public offense. The writ of habeas corpus may not be used, either for the purposes of a demurrer or as a writ of error, to review the findings of the lower court, or to review the conclusions and determination of a governor when issuing a warrant of rendition upon the demand of the executive of another state.

Furthermore, it should be remembered that the question whether the indictment sufficiently charges an

offense is for the courts of the state where the indictment was laid, to decide.

Bergmann v. Backer, 157 U. S. Rep. 655 (39 L. Ed. 845);

Kohl v. Lehlback, 160 U. S. Rep. 293 (40 L. Ed. 432).

As was well said by the court *In re* Reggel, 114 U. S. 642 (29 L. Ed. 250):

> "Each state has the right to prescribe the forms of pleading and process to be observed in her courts, subject only to those provisions of the National Constitution designed for the protection of life, liberty and property. Hence, in a case involving the surrender of a fugitive from justice, it may not be objected that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding state."

Therefore, it is necessary to consider the statutes of the state of Iowa and the decisions of the Supreme Court of that state for the purpose of determining whether the indictment in the instant case charges a public offense.

The indictment, set forth on pages 15, 16 and 17 of the transcript of record, was laid pursuant to the provisions of section 5041 of the Annotated Code of 1897 of the state of Iowa, which reads as follows:

> "Section 5041. False Pretenses.—If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or other prop-

erty, or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery, he shall be imprisoned in the penitentiary not more than seven years or be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding one year, or both such fine and imprisonment."

This statute does not describe a crime known as that of cheating by false pretenses, counsel for appellant to the contrary notwithstanding. The offense described is that of obtaining, by false pretense and with intent to defraud, the money, goods or property of another person. This being true, only two facts are necessary to be set out in the indictment.

1. That the prosecuting witness has been deprived of his money or goods or other property.

2. That such was obtained from him by the accused designedly and by false pretenses.

Measured by this test, let us examine the indictment. It appears upon the face thereof that the petitioner is accused of obtaining from one Sargent a certain draft drawn on an Iowa bank for a certain sum of money, and further, that this property was obtained designedly and by means of false pretenses and with intent to defraud. It further appears that the false pretenses consisted in the present representation of a material fact, to-wit: the fact that the accused was then the owner of a tract of land, which was free and clear of incumbrance, when in truth and in fact he did not own the said property and the same was not free or clear of incumbrance. We submit that the statement of

these facts meets every requirement of the statute under which the indictment was laid.

It is urged by counsel for petitioner, in the first place, that the indictment does not *charge* any offense known to the law, and that all of the elements of the offense must be present. That because the indictment charges the crime of false pretenses instead of the crime of cheating by false pretenses, the accused has not been legally charged with an offense.

The Supreme Court of the state of Iowa has held that an indictment describing an offense in the language of the statute without naming it is sufficient, although naming the offense without stating the facts constituting the crime will not be sufficient. The wrong name given to an offense in which the facts are properly stated will not vitiate the indictment, but is mere surplusage.

State v. Shaw, 35 Iowa 575;
State v. Davis, 41 Iowa 311;
State v. Wyatt, 76 Iowa 328.

It is further urged by counsel for appellant that because the indictment fails to state that Sargent, when defrauded of his property, intended to part with his title thereto, it states the crime of larceny and not that of cheating by false pretenses.

In answer to this contention, it must be remembered that the indictment specifically states that the draft was endorsed by him, prior to delivery to the accused. No citation of authorities is needed to sustain the principle of law that an endorsement and de-

livery of a negotiable instrument are sufficient to pass the title thereto. When the indictment states upon its face that the draft was endorsed by him, this is tantamount to a statement that title thereto passed and is sufficient to differentiate the offense from that known as larceny.

Furthermore, when the indictment states upon its face that he endorsed the draft, this was a sufficient allegation to show his intention to part with his title thereto.

It is further claimed by counsel for petitioner that the indictment does not state a public offense for the reason that it does not show that any person has been defrauded. This is urged, presumably, because the indictment is silent upon the question whether the accused deeded the real property in question to Sargent at the time he endorsed and delivered the draft to the accused, and because the indictment fails to state that there was any other consideration moving from the accused to Sargent, or that he has been compelled to assume and pay off the incumbrance upon the land which was represented to be free and clear of incumbrance.

The answer to this contention is found in the words of the statute under which the indictment was laid. It does not appear from the statute that any consideration should move from the accused to the prosecuting witness in order to make a complete crime. It is enough if it appear upon the face of the indictment that the property of the prosecuting witness was obtained by any fraudulent misrepresentation. The

crime would have been complete under the statute, even though the accused never in fact deeded the real property to the prosecuting witness.

Upon the question whether the draft was a valuable thing, and therefore whether Sargent was actually defrauded out of anything of value, it is necessary for this Honorable Court to consider the provisions of section 4849 of the Annotated Code of 1897 of the state of Iowa, which statute is set forth at length as follows:

> "Section 4849. If the property stolen consists of any bank note, bond, bill, covenant, bill of exchange, draft, order, or receipt, or any evidence of debt whatever, or any public security, or any instrument whereby any demand, right or obligation may be assigned, transferred, created, increased, released, extinguished or diminished, the money due thereon or secured thereby and remaining unsatisfied, or which in any event or contingency might be collected thereon, or the value of the property transferred or affected, as the case may be, shall be adjudged the value of the thing stolen."

It will appear that the money due upon this draft is the value thereof and when the indictment upon its face states that the amount of the draft was $5537.00, it showed that Sargent, when he endorsed and delivered the same to the accused, parted with a thing of value, worth the sum of money represented upon the face thereof.

Furthermore, the technical exactness of the common law which requires an exact statement of the offense

charged has been superseded by statutory provisions. It is enough to state the facts constituting the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is intended.

Section 5280 of the Annotated Code of 1897 of Iowa is as follows:

> "Section 5280. The indictment must contain:
>
> "1. The title of the action, giving the name of the court to which it is presented and the names of the parties;
>
> "2. A statement of the facts constituting the offense in ordinary and concise language without repetition and in such manner as to enable a person of common understanding to know what is intended."

Furthermore, by statute, the state of Iowa has prescribed what is sufficient to sustain the indictment.

Section 5289 of the Annotated Code of 1897 of the state of Iowa is as follows:

> "Sec. 5289. The indictment is sufficient if it can be understood therefrom:
>
> "1. That it was found by a grand jury of the county impanneled in the court having authority to receive it, though the name of the court is not actually stated.
>
> "2. That the defendant is named, or if his true name is unknown to the grand jury, such fact is stated and that he is described by a fictitious name.
>
> "3. That the offense is triable within the jurisdiction of the court.

"4. That the offense was committed prior to the time of the finding of the indictment.

"5. That the act or omission charged as the offense is stated in ordinary and concise language with such certainty and in such manner as to enable a person of common understanding to know what is intended and the court to pronounce judgment according to law upon a conviction.

"6. That, when material, the name of the person injured or attempted to be injured, be set forth when known to the grand jury, or if not known, that it be so stated in the indictment."

Furthermore, the legislature of that state has further prescribed that indictments shall not be insufficient because of the failure to state, with all the nicety of common law, the offense charged.

Section 5290 of the Annotated Code of 1897 of the state of Iowa, omitting such portions thereof as are not material to this argument, is as follows:

"Sec. 5290. Immaterial Matters.—No indictment is insufficient * * * by reason of any of the following matters:

"1. * * *

"2. * * *

"3. * * *

"4. For any surplusage or repugnant allegation or for any repetition when there is sufficient matter alleged to indicate clearly the offense and the person charged.

"5. * * *"

It has been held that ordinary language is sufficient if a person of common understanding may know therefrom what is intended.

State v. Stanley, 33 Iowa 526;
Bayard v. Baker, 76 Iowa 220;
State v. Coffrey, 62 N. W. 664 (Ia.).

Inasmuch as the Supreme Court of the United States has held that each individual state may prescribe its own forms of pleading and process, the proper determination of the questions involved upon this appeal require that the matters presented be determined in light of the statutes and decisions of that state.

Munsey v. Clough, 196 U. S. Rep. 273 (49 L. Ed. 515).

Briefly, we have tried to answer the points urged by counsel for appellant under their first specification of error and, briefly, have endeavored to reply to the points made by them in support of their claim of insufficiency of the indictment. These observations upon our part have been made without abating in the least our position that the question of the sufficiency or insufficiency of the indictment cannot be raised upon an appeal in habeas corpus. This Honorable Court should remember, therefore, that we have endeavored to reply to the position of counsel for fear that our silence in that behalf may be misconstrued. We do not believe that the question whether the indictment was sufficient can now be urged. None of the cases cited by counsel for appellant go so far as to hold that an appellate

court upon an appeal from a hearing under habeas corpus can determine whether the indictment which was presented to the governor of the extraditing state was sufficient or not. At this time we again urge that the appeal should be dismissed for want of jurisdiction, and reserve the right to present authorities in that behalf upon the hearing of the motion to dismiss the appeal. We believe that under the decisions, the judgment of the executive of the state upon whom a demand has been made for the surrender of a fugitive, as to the sufficiency of the indictment which has been presented to him is final, not only as to that question, but as to the question whether the accused is in fact a fugitive, and that this determination by the executive cannot be reviewed in the courts. Whether our position be sound upon the question whether the courts may inquire into the question of fact as to whether the accused is a fugitive or not, there can be no question but that the courts may not inquire into the sufficiency of the indictment, this question having once been determined by the executive of the state. The executive of the surrendering state cannot be controlled in the discharge of his duties in that behalf. It is for him to determine whether he will regard the requisition papers as sufficient proof that the accused has been charged with an offense.

Marbles v. Creecy, 215 U. S. Rep. 63 (54 L. Ed. 92.)

This principle of law grows out of the fact that the constitutional provision relating to fugitives from justice, is, as stated in the cases, in the nature of a treaty

stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states and while a state should protect its people against illegal action, federal courts should be equally careful that the provision be not so narrowly interpreted as to enable those who have offended the laws of one state to find a permanent asylum in another.

Appleyard v. Massachusetts, 203 U. S. Rep. 222 (51 L. Ed. 161).

Furthermore, that article of the Federal Constitution which provides for extradition requires nothing more than that there should be a charge of crime and an indictment which clearly describes the crime charged is sufficient even though it may possibly be bad as pleading, and the federal courts cannot on *habeas corpus* inquire into the truth of an allegation presenting mixed questions of law and fact in the indictment on which the demand for extradition is based.

Pierce v. Creecy, 210 U. S. 387 (52 L. Ed. 1113).

Recognizing the fact that the question whether the indictment be good or bad as a pleading cannot be presented in this matter, counsel for appellant attack the indictment upon the ground that it is bad as not stating an offense, but in so doing, proceed to urge reasons, which in themselves relate wholly to the sufficiency of the indictment as a pleading.

As is well said by Mr. Justice Moody, in the case last above cited:

> "The distinction between these two kinds of attack, though narrow, is clear. But it will not do to disclaim the right to attack the indictment as a criminal pleading and then to proceed to deny that it constitutes a charge of crime for reasons that are apt only to destroy its validity as a criminal pleading. There must be objections which reach deeper into the indictment than those which would be good against it in the court where it is pending."

It will be apparent to this court at once that all of the reasons which are here urged by counsel for appellant why the indictment was insufficient are reasons which can and should only be urged in the court where the indictment is laid for the purpose of having a judgment of that court as to its sufficiency.

It is urged in the second specification of error, that the lower court erred in excluding testimony offered by petitioner for the purpose of showing that he is not a fugitive from justice from the state of Iowa, and in that behalf that the court erred in rejecting testimony for the purpose of showing that the petitioner was publicly a resident within that state for more than the period prescribed by the statute of limitations, after the commission of the alleged crime, and counsel have cited and urged with much force, a number of authorities in support of their contention.

At the outset, it must be remembered that it is not necessary, in order that the accused be a fugitive, that he have *consciously* fled from the demanding state in order to avoid prosecution for the crime with which he is charged. It has been repeatedly held that it is not

necessary that the fleeing take place after indictment found, in order to make the person a fugitive. The fact that the offense here was committed in June, 1909, and the indictment not returned until November, 1914, should not mislead the court.

> "A person charged by indictment before a magistrate with a commission within a state of crime covered by its laws and who, after the date of the commission thereof, leaves the state, no matter for what purpose or with what motive, or under what belief becomes from the time of such leaving and within the meaning of the Constitution and the laws of the United States, a fugitive from justice and if found in another state, must be delivered up by the governor of such state to the state whose laws are alleged to have been violated, on the production of such indictment or affidavit certified as authentic by the governor of the state from which the accused deserted."

These are the words of Mr. Justice Harlam, in the opinion of the court in Appleyard v. Mass., *supra.* This principle of law has been repeatedly announced in other decisions of the Supreme Court of the United States, and the rule is so well settled that we will not burden the court with any citation of authorities. It is not necessary that the accused have left the state in which the crime is alleged to have been committed after an indictment found or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another.

Roberts v. Reilly, 116 U. S. 80 (29 L. Ed. 544).

In the next place, it must be remembered that the indictment upon its face affirmatively shows that the accused has not been publicly a resident within the state of Iowa during the period of time from the date of the commission of the offense until the time of the return of the indictment.

Counsel for appellant have, on page 20 of their brief, set forth at length section 5167, Annotated Code of 1897 of the State of Iowa, which is a statute which must be considered and read in connection with the statute of limitations, and they lay much stress upon the decision of the Circuit Court of Appeal for the Fourth Circuit, in the case of Bruce v. Rayner, 124 Federal Reports 481. This case can easily be distinguished from the case at bar and because of the distinction to be drawn, loses its force and efficacy as presenting a rule to be followed in the case at bar. In Bruce v. Rayner, the indictment upon its face showed affirmatively that the prosecution was barred under the provisions of the laws of the state in which the offense was committed. Of course, under such circumstances, it was competent for the petitioner to show that he had remained in the state without being concealed for a period of time greater than that prescribed for the statute of limitations. That being true, evidence that he had remained within the demanding state for such a period of time did not go to any matter of defense and tended to prove that the defendant was not a fugitive.

In the case at bar, however, the indictment affirmatively shows upon its face that the offense with which

petitioner is charged is not barred by the statute of limitations for the reason given in the indictment itself. To permit the accused in this case at the time of the hearing in the court below to have shown that he was publicly a resident within the state of Iowa for three years and more subsequent to the alleged commission of the offense, would be clothing a writ of *habeas corpus* with the functions of a writ of error. The tribunal to determine whether the accused was publicly a resident within the state of Iowa for the period claimed or not is the court of that state. It is purely a question of fact and not one of law and the Constitution never intended that a writ of *habeas corpus* should be used in this wise, when the courts of the demanding state are open to the accused, where his rights, it must be presumed, will be safeguarded and justice done.

As was well said by Mr. Justice Holmes in the very recent case of Drew, Sheriff, v. Harry Kendall Thaw, decided at the October, 1914, term of the Supreme Court of the United States, on the 21st day of December, 1914, which decision has not as yet been published in bound volumes,

> "In extradition proceedings, even when as here a humane opportunity is afforded to test them on *habeas corpus,* the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about *habeas corpus* in this connection, but peremptorily requires that upon proper demand the person charged shall be

delivered up to be removed to the state having jurisdiction of the crime. Article 4, section 2, Pettibone v. Nichols, 203 U. S. 192, 205. There is no discretion allowed, no inquiry into motives. Kentucky v. Dennison, 24 How. 66; Pettibone v. Nichols, 203 U. S. 192, 203. The technical sufficiency of the indictment is not open. Munsey v. Clough, 196 U. S. 364, 373. And even if it be true that the argument stated offers a nice question, it is a question as to the law of New York which the New York courts must decide."

This rule is based upon the theory that the federal courts will not interfere with the administration of the laws by the state courts where those laws are to be applied to facts arising under a violation of a state statute, unless it appears that the rights of an individual under the Constitution of the United States are about to be invaded. Indeed, as it further appears from the opinion in the above entitled case,

"How far such considerations shall be taken into account it is for the New York courts to decide, as it is for a New York jury to determine whether at the moment of the conspiracy, Thaw was insane in such sense as they may be instructed would make the fact a defense. Pierce v. Creecy, 210 U. S. 387, 405. Charlton v. Kelley, 229 U. S. 447, 462. When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury, for what it and the governor of New York allege to be a crime in that state and the reasonable possibility that it may be such, all appear, the constitutionally required sur-

render is not to be interferred with by the summary process of *habeas corpus* upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place."

Because the governor of California decided that, upon the showing made to him, the appellant here was a fugitive from justice and should be delivered up to the agent of the demanding state and because of the well-settled policy of the judicial branch of our government not to interfere with the executive branch and because of the authorities above cited, and particularly because this Honorable Court is without jurisdiction to pass upon this appeal, so far as it concerns the construction and application of the Constitution of the United States, which, after all, is the only ground of any merit to be found in this appeal, we urge the court to affirm the ruling and judgment of the District Court made in this matter.

Respectfully submitted,

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